

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**VICKY HATCH-STEVENSON on behalf of )  
SHANE HATCH, )**

**Plaintiff )**

**v. )**

**Docket No. 03-19-P-H**

**JO ANNE B. BARNHART, )  
Commissioner of Social Security, )**

**Defendant )**

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

This Supplemental Security Income (“SSI”) appeal involves an application for disability benefits submitted by the plaintiff on behalf of her minor son. The commissioner denied benefits. The plaintiff contends that the administrative law judge’s conclusions that her son’s condition did not meet the criteria in the listing for attention deficit hyperactivity disorder (“ADHD”) and that his combination of impairments did not equal a listing were not supported by substantial evidence. I recommend that the court affirm the decision of the commissioner.

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<sup>1</sup> This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on October 27, 2003, pursuant to Local Rule 16.3(2)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

The sequential evaluation process generally followed by the commissioner in making disability determinations, *see* 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), is somewhat modified when the claimant is a child, 20 C.F.R. § 416.924. In accordance with that section, the administrative law judge determined that the claimant had ADHD, depression and oppositional defiant disorder, which were severe impairments, but did not have an impairment or combination of impairments that met or medically or functionally equaled the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (“the Listings”), Findings 2, 3 & 6, Record at 38-39; and that he accordingly had not been disabled at any time through the date of the decision, Finding 7, *id.* at 39. The Appeals Council declined to review the decision, Record at 7-8, making it the final determination of the commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner’s decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Richardson v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

When a claim for benefits is made on behalf of a child, the commissioner must first determine whether the alleged disability is severe. 20 C.F.R. § 416.924(a), (c). If the disability is found to be severe, as was the case here, the question becomes whether the disability is one that is listed in Appendix 1, or that “medically equals, or functionally equals the listings.” 20 C.F.R. § 416.924(a). If the impairment, or combination of impairments, does not meet or equal this standard, the child is not disabled. 20 C.F.R. §

416.924(d)(2). An impairment or combination of impairments is medically equivalent in severity to a listed impairment when the medical findings are at least equal in severity and duration to the listed findings; medical equivalence must be based on medical findings. 20 C.F.R. § 416.926(a) & (b). Medical evidence includes symptoms, signs and laboratory findings, including psychological or developmental test findings. Appendix 1, § 112.00(B). An impairment or combination of impairments is functionally equivalent to a listed impairment when it results in marked limitations in two domains of functioning or an extreme limitation in one domain, based on all of the evidence in the record. 20 C.F.R. § 416.926a(a) & (b). A “marked” limitation occurs when an impairment or combination of impairments interferes seriously with the claimant’s ability independently to initiate, sustain or complete activities. 20 C.F.R. § 416.926a(e)(2). An “extreme” limitation exists when an impairment or combination of impairments interferes very seriously with the claimant’s ability independently to initiate, sustain or complete activities. 20 C.F.R. § 416.926a(e)(3). No single piece of information taken in isolation can establish whether a particular limitation is marked or severe. 20 C.F.R. § 416.926(a)(d)(4).

The plaintiff turns first to the Listing for ADHD, section 112.11 of Appendix 1.<sup>2</sup> That listing has paragraph A criteria and paragraph B criteria, both of which must be satisfied in order for a child to meet the listing. Appendix 1, § 112.00(A). Paragraph A deals with medical findings; Paragraph B describes functional limitations. When standardized tests are used to measure the degree of a functional limitation, a valid score that is two standard deviations below the norm for the test will be considered a marked restriction. Appendix 1, § 112.00(C). The relevant portion of the ADHD listing follows:

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<sup>2</sup> Counsel for the plaintiff contended at oral argument that oppositional defiant disorder, the third severe impairment found by the administrative law judge, is “a listing level disorder,” but provided no citation to any such listing. None is apparent to me on review of section 112 of the Listings.

Manifested by developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented findings of all three of the following:

1. Marked inattention; and
2. Marked impulsiveness; and
3. Marked hyperactivity;

AND

B. For . . . children (age 3 to attainment of age 18), resulting in at least two of the appropriate age-group criteria in paragraph B2 of 112.02.

Appendix 1 to Subpart P, 20 C.F.R. § 404, § 112.11. The appropriate age-group criteria in paragraph B2 of section 112.02 are the following:

a. Marked impairment in age-appropriate cognitive/communicative function, documented by medical findings . . . and including, if necessary, the results of appropriate standardized psychological tests . . . ; or

b. Marked impairment in age-appropriate social functioning, documented by history and medical findings . . . and including, if necessary, the results of appropriate standardized tests; or

c. Marked impairment in age-appropriate personal functioning, documented by history and medical findings . . . and including, if necessary, appropriate standardized tests; or

d. Marked difficulties in maintaining concentration, persistence, or pace.

*Id.* § 112.02(B)(2). In this case, the administrative law judge found that “the record lacks medical findings of marked inattention, marked impulsivity, and marked hyperactivity,” Record at 33, the requirements of paragraph A for the ADHD listing. The plaintiff contends that this finding alone justifies remand because the administrative law judge “[f]ail[ed] to explain the basis of his decision.” Plaintiff’s Itemized Statement of Specific Errors (“Itemized Statement”) (Docket No. 6) at 22-23. However, an observation to the effect that there is no medical evidence requires no further explanation. If such evidence exists, it is the plaintiff’s burden here to point it out, so that the court can determine whether the administrative law judge

appropriately rejected it. The lack of an “explanation” under these circumstances, standing alone, provides no basis for remand or other relief.

The plaintiff does point to the following pages of the record as asserted medical evidence sufficient to support a finding that all three of the Paragraph A criteria are met: 489, 491, 494-95, 502-03 and 505. *Id.* at 23-24. She also asserts that the claimant “has had several professionals diagnose or raise ADHD,” *id.* at 23, but, even if a diagnosis or “raising” of a possible diagnosis could be equated to a conclusion that a particular listing has been met, the conclusion that a listing is met is reserved for the commissioner, 20 C.F.R. § 416.927(e)(2); *Perkins v. Barnhart*, 266 F.Supp.2d 198, 205 (D. Mass. 2003), and such a general conclusion adds nothing to consideration of the question whether the three specific Paragraph A criteria have been met. Of the pages of the record cited by the plaintiff, pages 489, 491 and 494-95 are part of the occupational therapy evaluation performed by Kimberlee K. Wing, a licensed occupational therapist. Page 489, the first page of her report, contains no findings but rather sets forth background information provided to the therapist. Page 491 describes the tests that the therapist used with the claimant. Pages 494-95 present the therapist’s findings, of which only the following appear possibly to relate to the Paragraph A criteria: inadequate processing of sensory input may “impact” attentional issues; the claimant “currently does not like to sit still and does not like being in cars for long where he has to be confined;” and he “has a need for movement and heavy work patterns to help him . . . stay focused.” It is not at all clear whether these comments, which do not in any event address the criterion of impulsiveness, are equivalent to “marked” inattention and hyperactivity.

The remaining pages of the record cited by the plaintiff in this regard are part of the report of a neuropsychological evaluation performed by Ellen J. Popenoe, Ph.D., a clinical neuropsychologist. On page 502, Dr. Popenoe states that the claimant “demonstrates hyperactivity and attention problems in the

clinically significant range,” as reported by his mother; and that the claimant “generally was able to pay attention” during her interview with him. On page 503, she reports “low average” functioning in terms of ability to focus his attention to auditory stimulation and ability to modulate and inhibit impulsive responding. She also reports that the visual component of attention was moderately impaired, that he had significant difficulty sustaining attention over time and that he showed cognitive impulsivity. On page 505, Dr. Popenoe concludes that the claimant “demonstrates significant weaknesses in attentional control,” with the consequence that his ability to inhibit responses and regulate his performance “is highly variable,” and notes that “he uses his good intellectual abilities to compensate, especially in highly structured situations.” Dr. Popenoe mentions hyperactivity only based on the reports of the plaintiff. Her report, considered in total, does not support the conclusion that the impulsiveness and inattention which she noted may fairly be characterized as “marked” within the relevant regulatory definition. Particularly where, as here, the two state-agency reviewers have found that the regulatory medical criteria for ADHD have not been met, Record at 482, 485, 509, 512,<sup>3</sup> the administrative law judge cannot be said to have erred in concluding that the medical evidence did not meet the Paragraph A criteria for ADHD.

The Paragraph A criteria for depression, the other listing considered by the administrative law judge, include, in relevant part:

Characterized by a disturbance of mood (referring to a prolonged emotion that colors the whole psychic life, generally involving either depression or elation), accompanied by a full or partial manic or depressive syndrome.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented persistence, either continuous or intermittent, of one of the following:

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<sup>3</sup> The second state-agency report is dated after Dr. Popenoe’s report.

1. Major depressive syndrome, characterized by at least five of the following, which must include either depressed or irritable mood or markedly diminished interest or pleasure:

- a. Depressed or irritable mood; or
- b. Markedly diminished interest or pleasure in almost all activities; or
- c. Appetite or weight increase or decrease, or failure to make expected weight gains; or
- d. Sleep disturbance; or
- e. Psychomotor agitation or retardation; or
- f. Fatigue or loss of energy; or
- g. Feelings of worthlessness or guilt; or
- h. Difficulty thinking or concentrating; or
- i. Suicidal thoughts or acts; or
- j. Hallucinations, delusions, or paranoid thinking . . . .

Appendix 1, Subpart P, 20 C.F.R. § 404, § 112.04. The Paragraph B criteria for depression are the same as those for ADHD. With respect to this listing, the administrative law judge found medical evidence of depressed or irritable mood, sleep disturbance, difficulty thinking or concentrating and suicidal thoughts or acts, citing exhibits 3F, 4F and 12 F. Record at 33. The plaintiff does not suggest that the medical evidence supports the necessary fifth element of the Paragraph A criteria but rather faults the administrative law judge's lack of discussion of "any reasons why he rejected the other criteria." Itemized Statement at 25. In the absence of citation to any evidence of any of these elements, the plaintiff is not entitled to remand on this basis.

The plaintiff next faults the administrative law judge's asserted failure to consider whether the ADHD, depression and oppositional defiant disorder, taken together, met or medically equaled a listing. *Id.* However, she fails to suggest any listing that would have been met or medically equaled or to suggest how

such a result could have been reached. In the absence of any developed argument on this point, she is not entitled to remand for this reason.<sup>4</sup>

Moving on to the functional equivalence of a listing, where the “domains” are considered, the plaintiff contends that the claimant had marked limitations in three domains: attending to and completing tasks, interacting and relating with others, and caring for himself. *Id.* at 27. The administrative law judge found that the claimant had less than marked limitations in all six domains. Record at 36-38. Marked limitation in two domains is required for functional equivalence of a listing. 20 C.F.R. § 416.926a(a). I will discuss the administrative law judge’s analysis only of the three domains on which the plaintiff relies.

With respect to attending to and completing tasks, the administrative law judge found that the claimant was able to attend to and complete tasks in school with occasional cues and intervention, citing Exhibit 1E-11; that Dr. Popenoe found him to have moderate impairment of visual attention but mild impairment to above average ranking in all other areas tested, citing Exhibit 12F-11; that his school testing generated scores on perceptual organization, freedom from distractibility and processing speed less than two standard deviations from mean, citing Exhibit 1E-131; that he was quite attentive and focused during the occupational therapy evaluation, citing Exhibit 11F-2; and that his teachers observed that he was capable of performing tasks but sometimes needed direction. Record at 37. The plaintiff takes issue with the administrative law judge’s characterization of the school record concerning the claimant’s ability to attend and complete tasks, and points out that evaluations completed after that cited by the administrative

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<sup>4</sup> The plaintiff contends that the administrative law judge should have considered whether the claimant met the listing for tic disorders, section 112.07, based on the asserted diagnosis by Stephen Rioux, M.D., of Tourette’s Syndrome. Itemized Statement at 25. The administrative law judge did not find that the claimant’s tics or Tourette’s Syndrome was severe, a necessary step before the listing may be considered, but, assuming *arguendo* that this impairment were properly considered severe, the criteria of the listing clearly are not met. The only relevant Paragraph A requirement is for “[p]ersistent and recurrent involuntary, repetitive, rapid, purposeless motor movements affecting multiple muscle groups (*continued on next page*)

law judge noted “significant problems of attention.” Itemized Statement at 28-29. However, the pages of the record cited by the plaintiff in support of this assertion, to the extent that they involve the claimant’s school work at all, are open to interpretations other than those presented by the plaintiff, particularly when the evidence must be considered against the definition of “marked” provided by 40 C.F.R. § 416.926a(d)(2). The plaintiff also cites tests conducted by the occupational therapist on which the claimant’s results “fell more than two standard deviations below the mean” — tactile sensitivity, underresponsiveness/seeks sensation, auditory filtering, and visual/auditory sensitivity — but fails to suggest how these specific tests demonstrate limitations on attending and completing tasks, Itemized Statement at 30, a connection that is not apparent. On balance, the administrative law judge did not err in finding that the limitations on the claimant’s abilities in attending to and completing tasks were not marked, a conclusion supported by one of the state-agency reviewers. Record at 511.

With respect to the domain of interacting and relating with others, the administrative law judge found that, while the plaintiff described the claimant “as having markedly impaired social skills,” the medical records “include multiple observations that the claimant is cooperative, cheerful, and compliant.” Record at 37. He also noted that the school records included instances of misconduct “but not to an extent that would meet the definition of a marked impairment.” *Id.* at 484, 511. The state-agency reviewers agreed. *Id.* at 484, 511. The plaintiff relies on her own testimony and several specific incidents reported in the school records. Itemized Statement at 31-32. While the record does contain conflicting evidence with respect to this domain, it is the province of the administrative law judge to resolve such conflicts. So long as there is substantial evidence to

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with multiple vocal tics.” Appendix 1, Subpart P, 20 C.F.R. § 404, § 112.07(A)(2). There is no mention in Dr. Rioux’s report of tics affecting multiple motor groups or any vocal tics at all. Record at 513-15.

support the choice made by the administrative law judge, as there is in this case, that choice cannot be overturned.

The administrative law judge's discussion of the remaining domain at issue, caring for oneself,<sup>5</sup> is quite brief. He states that "[t]he claimant's mother reports a continued need to assist the claimant with activities such as showering and dressing, but record [sic] does not suggest that the claimant has a marked limitation in performing these activities." Record at 38. The plaintiff accurately points out that evidence in the record actually supports the conclusions that he has marked limitations in this domain. Significantly, the regulations define this domain, in relevant part, as involving "how well you maintain a healthy emotional and physical state, including how you get your physical and emotional wants and needs met in appropriate ways; how you cope with stress and changes in your environment; and whether you take care of your own health, possessions, and living area." 20 C.F.R. § 416.926a(k). The regulations further provide that children as old as the claimant "should be independent in most day-to-day activities (*e.g.*, dressing yourself, bathing yourself), although you may still need to be reminded sometimes to do these routinely." 20 C.F.R. § 416.926a(k)(2)(iv). The only evidence in the record on this point is to the contrary. *E.g.*, Record at 15, 76, 328. The record also suggests, on balance, that the claimant has marked limitations in maintaining a healthy emotional state, coping with stress and changes in his environment and getting his needs and desires met in appropriate ways, all elements of this domain that are not mentioned by the administrative law judge. The lack of substantial evidence to support the administrative law judge's finding with respect to this single

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<sup>5</sup> Counsel for the commissioner accurately pointed out at oral argument that counsel for the plaintiff took the position at the hearing before the administrative law judge that only the domains of attending and completing tasks and interacting and relating with others were at issue. Record at 63. Because I conclude that the administrative law judge did not err in evaluating the evidence concerning these domains, it is not necessary to address the commissioner's argument that the plaintiff has waived any reliance on the domain of caring for oneself. I provide my analysis of the administrative law judge's evaluation of that domain should the court disagree with my analysis of his evaluation of the other two domains.

domain, however, is not enough to require remand. Marked limitations in two domains are required before further consideration of functional equivalence of a listing need occur. Accordingly, the plaintiff is not entitled to remand on this basis.

### **Conclusion**

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 31st day of October, 2003.

/s/David M. Cohen

David M. Cohen

United States Magistrate Judge

### **Plaintiff**

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V.

**Defendant**

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